COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 023257-88 034089-92**

Richard DeFeo	Employee
Mobil Oil Corporation	Employer
Insurance Co. of the State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and Horan)

APPEARANCES
Daniel P. Napolitano, Esq., for the employee
Michael T. Henry, Esq., for the insurer

COSTIGAN, J. The employee appeals from the fourth hearing decision filed in his case,[1] in which an administrative judge denied his claim for § 34A

[1] The first three hearing decisions were filed by a different administrative judge, and were admitted into evidence at the 2003 hearing. (Dec. 4.) Because certain findings of fact, rulings of law, and benefit awards made in those decisions are essential to the issues raised in the current appeal, we set them forth.

In the first decision, filed on May 11, 1995 and amended on May 30, 1995, the judge found that the employee had sustained compensable injuries to his left and right shoulders on April 23, 1988 and May 3, 1992, respectively. He awarded the employee six distinct periods of total and partial incapacity benefits commencing on August 3, 1992, when the employee first lost time from work due to his right shoulder injury. As to the periods of incapacity attributed to the right shoulder injury, the judge awarded benefits at the rates applicable to the 1992 injury, i.e., § 34 benefits equal to sixty per cent of the employee's 1992 average weekly wage, stipulated by the parties to be $852.88, and § 35 benefits equal to sixty per cent of the difference between the employee's average weekly wage and the assigned earning capacity. As to the sole period of total incapacity attributed to the employee's left shoulder injury, that commencing in December 1993 with the first of two surgeries on that shoulder, the judge awarded benefits at the rate applicable to the 1988 injury, i.e., § 34 benefits equal to two-thirds of the employee's average weekly wage, capped at the then statutory maximum of $411.00, based, however, on the 1992 stipulated average weekly wage. As to two periods of partial incapacity, commencing in 1994 and found by the judge to be causally related to both shoulder injuries, the judge applied the provisions of § 1(7A), and found the 1988 left shoulder injury to be "the predominant cause" of that partial incapacity. Therefore, he awarded

permanent and total incapacity benefits for bilateral shoulder injuries, or, in the alternative, § 35 temporary partial incapacity benefits for his 1988 left shoulder injury. We summarily affirm the judge's denial of the § 34A claim, as well as his findings that the employee's alleged neck, low back and left knee complaints, and the traumatic amputation of three fingers sustained in a power saw accident at home, were unrelated to either of his compensable shoulder injuries. However, we recommit the case for further subsidiary findings of fact as to the employee's left shoulder-related partial incapacity, and what, if any, weekly benefits he is entitled to receive as a result of that injury.

The employee injured his left shoulder at work on April 23, 1988. He was out from work for approximately three months. The insurer accepted liability and paid weekly incapacity benefits. On May 3, 1992, he injured his right shoulder while working for the same employer. (Dec. 1.) As a result of a 1997 hearing

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§ 35 benefits, again based on the 1992 average weekly wage, but pursuant to the formula applicable to the 1988 injury, see footnote 3, infra, and capped at the same $411.00 weekly statutory maximum. (DIA Ex. 4.)

The insurer appealed, and the reviewing board held that because the 1988 left shoulder injury was compensable under c. 152, § 1(7A) was inapplicable to the employee's claimed incapacity from 1994 and continuing. The board recommitted the case to the judge "for further findings as to the causal relationship of the claimed impairment beginning in 1994, in accordance with correct principles of law." DeFeo v. Mobil Oil Corp., 11 Mass. Workers' Comp. Rep. 199, 202 (1997).

In his June 30, 1997 decision on recommittal, the administrative judge found that the "as is" standard of causation, and not the "a major" standard under § 1(7A), applied to all periods of incapacity claimed after the employee's 1992 right shoulder injury. The judge held that "the proper law to apply to the employee's fourth, fifth and sixth periods of disability, is the law in force on the date of the 1992 injury." (DIA Ex. 3, p. 661.) For the sixth period of claimed incapacity, the judge assigned the employee a $240.00 earning capacity and awarded weekly § 35 benefits of $367.72, from October 14, 1994 and continuing. (Id. at p. 662.)

In his third hearing decision, filed on July 29, 1999, the administrative judge denied the employee's claim for § 34A permanent and total incapacity benefits, and instead awarded him "section 35 partial disability compensation from March 12, 1998 until the exhaustion of section 35 benefits," based on an assigned earning capacity of $240.00 and the same 1992 average weekly wage of $852.88. (DIA Ex. 2, p. 439.)

decision, see footnote 1, supra, the employee received ongoing partial incapacity benefits. (DIA Ex. 3.) In 1998, the employee brought a claim for permanent and total incapacity benefits. (Dec. 1.) Following a § 10A conference, the judge awarded § 34A benefits and the insurer appealed. In his 1999 hearing decision, the judge denied the employee's § 34A claim but ordered continuing partial incapacity benefits due to the effects of both shoulder injuries, until statutory exhaustion. (DIA Ex. 2.) See footnote 1, supra.

The present matter came before a different administrative judge on the insurer's complaint for recoupment under § 11D(3), to which the employee joined claims for permanent and total incapacity benefits for either or both shoulder injuries, or, in the alternative, for temporary partial incapacity benefits related to the 1988 left shoulder injury. He also claimed medical benefits related to various left and right shoulder surgeries.[2]

On May 6, 2002, the employee was examined by Dr. Panos Panagakos pursuant to G. L. c. 152, § 11A(2). Dr. Panagakos opined that the employee's left shoulder impairment continued causally related to his 1988 work injury, and disabled him from returning to his former employment, or from working above the horizontal plane, reaching, pulling and pushing. (Dec. 8-9.) The judge adopted Dr. Panagakos's opinions. (Dec. 13.) The judge concluded that the employee had "not shown a worsening of his condition based solely on the effects of his left and right shoulder injuries," since the prior administrative judge's 1999 decision awarding § 35 partial incapacity benefits. The judge therefore denied the employee's claim for § 34A benefits. (Dec. 12-14.) See Foley's Case, 358 Mass. 230, 232-233 (1970). The judge awarded § 13 and § 30 medical benefits for the employee's shoulder surgeries, and awarded § 34 benefits for two periods of post-surgical recuperation but, without explanation, he awarded no other weekly

[2] Although not reflected in the decision before us on appeal, at the 2003 third hearing, the parties agreed that the employee had exhausted the § 35 statutory maximum applicable to his 1992 right shoulder injury on or about October 21, 1998. (Tr. 4.)

incapacity benefits. (Dec. 14-15.)

We summarily affirm the decision as to all but one of the issues argued by the employee on appeal. The employee argues that while partial incapacity benefits for his 1992 right shoulder injury have been exhausted, partial incapacity benefits are still available for his 1988 left shoulder injury. The employee contends that the judge erred by failing to address this alternative claim at hearing. We agree, and recommit this case for the judge to do so.

In Dillon's Case, 335 Mass. 285 (1957), the court addressed whether a member of the industrial accident board could order compensation for a first injury in a successive insurer case, when the disabling effects of the second injury had ceased. The court held that an order of payment against the first insurer was proper:

> Here the single member found . . . that the employee had fully recovered from the effect of the second injury . . . , but that he was [still] suffering from the residuals and symptoms of the first injury. The case now stands as though the second injury had not occurred. As the employee is still partially incapacitated because of residuals and symptoms of the first injury, it was proper to order [the first insurer] to make the specified payments to compensate therefor.

Id. at 288-289. See also Turcotte v. Westinghouse Elec. Corp., 9 Mass. Workers' Comp. Rep. 300 (1995). Here, we do not have successive insurers, nor do we have a finding that the employee had fully recovered from his second injury -- the 1992 right shoulder injury. To the contrary, the judge found that the employee's partial incapacity from and after March 12, 1998 was due to the effects of *both* shoulder injuries. (DIA Ex. 2.) However, the practical effect of the exhaustion of the partial incapacity benefits available for the 1992 injury is much the same as if the employee had fully recovered from his right shoulder injury, as in Dillon, supra.

The opinion of Dr. Panagakos is clear that the 1988 left shoulder injury continued to bear a causal relation to the employee's disability, after the date on

which § 35 benefits were exhausted on the right shoulder injury. See footnote 2, supra. Therefore, the administrative judge should have determined the extent of disability attributable solely to the employee's 1988 left shoulder injury, and then decided what incapacity benefits, if any, the employee was entitled to receive for that injury alone. Because the judge did not do so, recommittal is necessary.

In so concluding, we disagree with the insurer that we are effecting an apportionment of benefit entitlement between the two injuries. "[O]nly one of successive [injuries] is to [be compensated] for one and the same incapacity." Evans's Case, 299 Mass. 435, 437 (1938). That there is a greater potential entitlement for § 35 benefits under the law in effect in 1988[3] does not constitute an apportionment, nor would an award of incapacity benefits for the 1988 injury constitute double recovery. Double recovery is avoided because the partial incapacity benefits paid under the 1992 date of injury, but found by the judge to be attributable to *both* shoulder injuries, must be credited against the 1988 injury as well, in accord with the successive insurer – or here, the successive *injury* - rule.

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[3] Section 35 of G. L. c. 152, as amended by St. 1985, c. 572, § 44, and applicable to the employee's 1988 left shoulder injury, provided:

> While the incapacity for work resulting from the injury is partial, during each week of incapacity the insurer shall pay the injured employee a weekly compensation equal to two-thirds of the difference between his average weekly wage before the injury and the weekly wage he is capable of earning after the injury, but not more than the maximum weekly compensation rate . . . . The total number of weeks of compensation due the employee under this section shall not exceed six hundred.

Section 35, as amended by St. 1991, c. 398, § 63, and applicable to the employee's 1992 right shoulder injury, provided in pertinent part:

> While the incapacity for work resulting from the injury is partial, during each week of incapacity the insurer shall pay the injured employee a weekly compensation equal to sixty percent of the difference between his or her average weekly wage before the injury and the weekly wage he or she is capable of earning after the injury, but not more than seventy-five percent of what such employee would receive if he or she were eligible for total incapacity benefits under section thirty four . . . . The total number of weeks of compensation due the employee under this section shall not exceed two hundred sixty.

See Laverde v. Hobart Sales and Service, 18 Mass. Workers' Comp. Rep. 214 (2004)(employee allowed to recover remainder of first injury benefits available, offset for concurrent payment of second injury benefits to maximum entitlement).

It is important to note that at the 2003 hearing, the insurer raised the applicability of § 35B[4] to the employee's claims, (Tr. 3; Insurer's Hearing Memorandum),[5] although the hearing decision fails to so indicate. It is well established that if the criteria for applicability of § 35B are met, the rates in effect at the time of the subsequent injury, see Don Francisco's Case, 14 Mass. App. Ct. 456, 461 (1982), whether higher or lower than the rates in effect at the time of the original injury, govern the employee's entitlement. Taylor's Case, 44 Mass. App. Ct. 495, 498-501 (1998). Moreover, the term, "rate in effect," includes use of the employee's average weekly wage at the time of the subsequent injury to calculate weekly benefits. Bernardo's Case, 24 Mass. App. Ct. 48 (1982).

As the judge's decision is silent on the applicability of § 35B to the employee's 1988 injury claim, we cannot conclude that his refusal to award any partial incapacity benefits following exhaustion of the 1992 § 35 statutory maximum was based on an application of § 35B. Likewise, notwithstanding that the parties stipulated that $852.88 was the average weekly wage applicable to all of the employee's pending claims, (Dec. 3), and the prior administrative judge had found that to be the employee's pre-injury average weekly wage in 1992, we cannot conclude that the parties stipulated to the applicability of § 35B. This is

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[4] Section 35B of G. L. c. 152, as inserted by St. 1970, c. 667, § 1, provides in pertinent part:

> An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury whether or not such subsequent injury is determined to be a recurrence of the former injury . . . .

[5] The verbatim transcript of the hearing so reflects, (Tr. 3), as does the Insurer's Hearing Memorandum, contained in the Board file, of which we take judicial notice. See Rizzo v. M.B.T.A, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

because the prior judge awarded temporary total incapacity benefits for the period following the employee's December 1993 left shoulder surgery, at the 1988 § 34 statutory maximum of $411.00 whereas, under § 35B, the 1992 rate formula of sixty per cent of $852.88 would have yielded a § 34 rate of $511.73, lower than the then statutory maximum of $565.94 but higher than the 1988 maximum. (DIA Ex. 4.) On appeal by the employee, that decision was summarily affirmed by the reviewing board.

Accordingly, we recommit the case for further findings as to whether the employee, at any time after his return to work from his 1988 left shoulder injury,[6] suffered a "subsequent injury" to that shoulder, so as to render § 35B applicable to the employee's claim for partial incapacity benefits from and after October 21, 1998. If the judge finds that § 35B is applicable, he must then determine when the "subsequent injury" occurred, to determine the statutory maximum entitlement then in effect for partial incapacity, and whether any § 35 benefits remain available to the employee. If the judge finds that there was a "subsequent injury" based on the employee's 1988 left shoulder injury prior to December 23, 1991, or if he finds no subsequent injury, the judge must address the employee's partial incapacity due *solely* to the effects of his left shoulder injury, and determine his entitlement to § 35 benefits accordingly.[7] See Hummer's Case, 317 Mass. 617, 623 (1945); Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39, 45 (2002). In all other respects, the decision is affirmed.

So ordered.

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[6] The administrative judge's finding that the employee's condition had not worsened since the *1999* decision finding him only partially incapacitated is dispositive of the employee's § 34A claim, see Foley's Case, supra, but leaves unaddressed whether the employee's left shoulder condition worsened at any point after his return to work in 1988, or at least from when he went out of work for good in August 1992.

[7] As discussed infra, should the judge find the employee entitled to partial incapacity benefits for his 1988 injury, the partial incapacity benefits paid under the 1992 date of injury must be credited against the 1988 § 35 statutory maximum, so as to avoid a double recovery. See Laverde, supra at 220.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **May 12, 2005**